



2017

# Book Review: Proposals for Creating a Realistic Family Court for the Future

Theresa Furnari

*Circuit Court for Baltimore City, Maryland*

Melissa View

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>

 Part of the [State and Local Government Law Commons](#)

### Recommended Citation

Furnari, Theresa and View, Melissa (2017) "Book Review: Proposals for Creating a Realistic Family Court for the Future," *University of Baltimore Law Forum*: Vol. 47 : No. 2 , Article 4.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol47/iss2/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

## BOOK REVIEW

---

### PROPOSALS FOR CREATING A REALISTIC FAMILY COURT FOR THE FUTURE

**By: Family Magistrate Theresa A. Furnari<sup>1</sup> with the assistance of  
Melissa View<sup>2</sup>**

During one of the snowstorms in the winter of 2016, I sat before the fireplace and read *Divorced from Reality: Rethinking Family Dispute Resolution*, by Jane C. Murphy and Jana B. Singer. Because I know the authors and their wealth of experience in family law, as well as their sincere interest in improving the effectiveness of the family law court, I was delighted when asked to share my opinion of the book. As a Family Magistrate in a high volume court, it never ceases to amaze me of the variety of issues the court is confronted with on a daily basis. While Maryland's five larger circuit courts have in place a "Family Division" to respond to the needs of its litigant pool, there is always room to advance how the court administers family law cases. Given the amount of recidivism and the fact that the court is too often the first place families go to settle their disputes, the court is sensitive to new approaches to address the issues that arise in family law cases. It is for this reason that I found *Divorced from Reality: Rethinking Family Dispute Resolution* an eye-opening reflection of how the court has resolved family disputes in the past, how they are doing so currently, and the host of possibilities to consider when creating a family court for the future.

The book begins by recounting the origins of family law in order to discuss its evolution and possible reforms that will encompass the evolving role of the court in the future and the makeup of families. Beginning in Colonial America, children were seen as their father's property and not as individuals. Because women had no legal rights, the role of the court was limited to the lives of poor children when the court would strip away a father's custody if he was unable to provide for his children. Change occurred in the post-Revolutionary era, under the influence of domestic egalitarianism, when a

---

<sup>1</sup> Magistrate Furnari has served as Family Magistrate for the Circuit Court for Baltimore City for nearly 15 years. Prior to her position on the bench, she was in private practice, which included 5 years representing the Department of Social Services, children and then parents when appearing in juvenile court across the State of Maryland. Magistrate Furnari is a board member of the Chesapeake Center for Youth Development and is very active in community matters. She is a graduate of Tulane University School of Law.

<sup>2</sup> Melissa View graduated in 2016 from the University of Maryland Francis King Carey School of Law. As a law student, Ms. View worked with the Legal Aid Bureau, Inc. and is a recipient of the Linda Kennedy Fellowship through the Homeless Persons Representation Project, Inc. Although Ms. View's contribution to this article was valuable, the opinions expressed in this article are solely those of Magistrate Furnari.

separation began concerning work and home. This separation recognized the importance of women in the home and began a process of awarding women custody of minor children. However, as described by the authors, a bigger force in changing the rights of parties was the switch from legislative to judicial divorces.

Due to the increasing rates of divorce, courts became the center of divorce proceedings and divorces adapted to a traditional adversarial process, resulting in a focus on fault. The focus on fault spilled into the award of child custody, with the party who was found to be innocent of the marital indiscretion being awarded custody. With the emergence of no-fault divorces in the second half of the twentieth century, the court began to allow parties to determine how to end their marriage and split parenting responsibilities. However, and as noted by the authors, courts were slower to move away from the tender years doctrine, which gave preference to the mother unless she was proven to be unfit. Change did occur with the evolution of the gender equality movement. Once courts moved from sole to joint custody, courts moved from an adversarial model to a managerial model, focusing on a long-term co-parenting plan.

The authors contend the criticism of the adversarial model sought the creation of a paradigm shift to a new model of how to adjudicate a family law case. The new model, the authors described, encompasses a new way of thinking regarding the familial relationship in that it is a long-lasting process that cannot be divided into discrete legal issues. The new model embraces non-legal norms, and it also encourages the use of mediators and mental health experts.

The authors acknowledge the new model comes with its risks and hurdles. The changing role of the court increases the amount of post-divorce litigation. The greater use of non-legal professionals, while they can add significant insight into the matter, create risks as these individuals may come from unclear educational backgrounds with unclear ethical standards. While the authors assert that mediation allows for the parties to come up with an agreement that is tailored to their situation, it also poses a risk that unrepresented parties may sign away rights without realizing the significance. Additionally, the new model encourages further encroachment by the court and those asked to assist into the traditionally private family sphere. The authors found that this intrusion is especially present for low-income mothers, due to a general bias that creates more scrutiny for individuals in this situation. Lastly, the authors described how the new model may also discourage the development of law and policy regarding family law. Because the new model requires courts to implement a non-legal process, the courts are asked to do something that it is not designed to do and may take away from the court's responsibility to be "a forum for fair and authoritative dispute resolution."

After assessing the changing role of the court and the introduction of additional professionals of the new model, the authors described the changing faces of the family law litigant, specifically, the changes to the family

structure, most prominently with the decline in marriages. However, the authors find this decline in marriages has not been met with a decline in parenthood; in fact, there has been an increase in the number of children born to unwed parents. The rise in unwed parents has been most significant among less wealthy and less educated individuals. With this, the number of *pro se* litigants has greatly increased. As a result, the authors conclude, this places pressure on court staff to walk the line between not giving legal advice and making sure that parties understand the legal consequences to their actions. Moreover, a caveat of the new model is that it assumes litigants have a preexisting relationship and is not reflective of the increase in unwed parents who use courts to establish a parental relationship versus trying to modify a current familial relationship.

The new model, as described by the authors, will place new burdens on courts and attorneys. The new model increases decision-making through negotiation and decreases decisions through the traditional process of arguments before a third-party decision-maker. This causes the attorney to assist the client in goal setting for a long-term solution versus a plan for a clean legal break. The paradigm shift the authors describe tasks judges with administrative and managerial duties. When deciding cases, judges are required to approach the initial legal issues with lawyers, mental health professionals, court personnel, and family members. This large, collaborative process makes the judge less like a neutral arbiter and more like a coach.

Prior to proposing a number of recommendations for instituting the new model, the authors describe processes in other countries, highlighting approaches that entirely remove the family law disputes from the court. Additionally, the authors describe the work of the United Nations, which has created a list of international norms through the United Nations Convention on the Rights of the Child. These norms make the child an individual rights holder with the child's opinion given a varying amount of weight depending on age and maturity. Some countries have responded by requiring children to participate in any collaborative separation process.

The authors funnel their findings into a concise list of reforms for transforming the traditional adversarial system to a non-adversarial dispute resolution focus. To make these non-adversarial services more accessible and less problematic for the traditional role of the court, the authors first conclude that these services should be based in the community. Second, reforms should focus on incorporating the child into the non-adversarial process. Third, reforms should adapt to the modern family, which is more likely to encompass unwed parents, step-parents, and a breakdown of traditional gendered parenting roles. With this, reforms need to recognize that amongst modern families there is a significant economic disparity and those without means should be provided access to collaborative programs. Overall, the authors assert the current system needs to be updated to reflect the diversification of parties coming before the court and the shortcomings of a purely adversarial process.

From its provocative title to its final list of recommendations, I find this book will challenge judicial reformers to question how effectively we are responding to the needs of the family law litigant. Although the historical overview demonstrates changes that have taken place, the balance of the book seeks to demonstrate and support the design of a new model and its additional changes.

The authors' description of the litigant pools and the necessary services are most accurate. In my courtroom, litigants are comprised of all races, nationalities, and social economic backgrounds. Their familial relationship may be longstanding or a single brief encounter. With the emerging rights of same sex couples and transgender individuals, their presence in the courtroom is increasing. In addition to the expanding demographics of litigants, many family law cases involve extended families, including grandparents, step-parents, aunts, uncles, and cousins. The number of *pro se* litigants who appear before the Baltimore City Court consistently average between 87-92%. Therefore, as the authors noted, because the court has to determine what is in the best interest of the child, the court has the added responsibility of educating litigants without crossing the line of a passive umpire and impartial finder of facts and law.

In addition to the varied litigant pool, a family law case may generate a myriad of services in order for the court to determine what is in the best interest of the minor child. In addition to the use of language or sign language interpreters, the case may require testing for alleged drug and alcohol use, psychological evaluations, counseling referrals, ability to work evaluations, and supervised visitation services. A court may have mediation services available and, although there is a cost, some courts are able to provide services free of charge based upon income eligibility. For some of the most difficult cases, labor-intensive investigations by custody evaluators may also be required. In the new model, litigants may work with non-legal professionals in areas of substance abuse, anger management, domestic violence, counseling, mental health treatment, homelessness, and unemployment, all of which may affect the stability of a family. Although the authors do not explain how such expanded services will be paid for, identifying the need for such services is helpful for reformers.

After pondering the content of the book, I conclude the four corners of the new model to be the following: alternative dispute resolution (ADR), the changing role of the attorney, the use of non-legal services, and the expanded role of the judge. When considering the authors' emphasis for expanding the use of ADR in the new model, I cannot agree more with their prediction. The use of ADR is well entrenched in the court system and it is successful. Therefore, I see little risk for implementing an expanded variety of ADR processes earlier in the legal course as called for by the authors. Furthermore, attorneys and mediators should take on a more collaborative role and litigants should be provided the assistance of counsel. I believe these measures are possible and are currently occurring in varying degrees. By 2016, the growth

of ADR in the family law arena has grown beyond its expectations. It is a fixture in the court system for settling cases. And, in my experience, even when a settlement agreement is not reached, there are still advantages gained from participating in an ADR process. One, while the parties may not have a full agreement, they are able to put in place a partial agreement to test their ability to reach a full agreement. Two, when the parties participate, it may be the first time parties have listened and talked to each other. Three, by participating in an ADR process, the parties may learn new skills when responding to disputes in the future. Four, it is very empowering and sustaining for parties to come up with their own agreement. Because it is their agreement, I have found that they are more active participants.

To respond to the authors' concern for parties entering into agreements without knowing their legal rights, this concern can be ameliorated if parties are provided counsel during the mediation process. Currently, there is only one court in the State of Maryland that requires the presence of counsel in the court-ordered mediation process.<sup>3</sup> With counsel present, the parties will have the benefit to consult with an attorney during the mediation process in order to arrive at a thorough agreement. Some mediators have found that some attorneys, instead of working towards a settlement, are obstructionists and create further animosity between the parties. However, the use of ADR has been around for a number of years and we are long passed the time when ADR should be considered an alternative to litigation in family law cases. Rather, attorneys should be aware of ADR and should be counseling their clients as to the possible use of the practice of ADR at, or soon after, the initial consult.<sup>4</sup>

In those cases where the litigants cannot afford attorneys for the ADR process, attorneys should be provided on a limited representation basis. For the last eight years, I have had the pleasure of presiding over cases where litigants have participated in in-house mediation. The parties have been represented by pro bono attorneys from the Pro Bono Resource Center<sup>5</sup> and Rule 19-217<sup>6</sup> attorneys through the University of Baltimore School of Law

---

<sup>3</sup> Based on a survey of 24 circuit courts, only one court, Montgomery County, required the attendance of attorneys at the mediation.

<sup>4</sup> Comment 5, Maryland Rules of Professional Conduct, Rule 19-302.1 provides, "Similarly, when a matter is likely to involve litigation and, in the opinion of the attorney, one or more forms of alternative dispute resolution are reasonable alternatives to litigation, the attorney should advise the client about those reasonable alternatives."

<sup>5</sup> Pro Bono Resource Center of Maryland, 520 West Fayette Street, Baltimore, Maryland 21201.

<sup>6</sup> Maryland Rules of Professional Conduct, Rule 19-217(d) provides, "In connection with a clinical program or externship, a student for whom a certification is in effect may appear in any trial court or the Court of Special Appeals, or before any administrative agency, and may otherwise engage in the practice of law in Maryland, provided that the supervisory attorney (1) is satisfied that the student is competent to perform the duties assigned, (2) assumes responsibility for the quality of the

Mediation Clinic for Families. As a result, the court has witnessed the execution of thorough agreements and litigants with smiles on their faces when they leave the courtroom. The legal representation is on a limited basis and averages approximately four hours of total time. Although Baltimore City has the benefit of having two law schools within a short distance from the courthouse, I believe this type of program can be duplicated statewide with the involvement of attorneys who are willing to volunteer, whose hours can be applied to satisfy an attorney's requirement under Rule 16-301.1 (Pro Bono Publico Service 6.1) of the Maryland Rules of Professional Responsibility.<sup>7</sup> I believe having attorneys representing litigants during the ADR process will achieve three goals: (1) the case may be settled; (2) litigants will experience a new way to resolve their disputes; and (3) attorneys will practice new skills of how to counsel a client. I believe this is one type of advocacy that is envisioned by the authors.

Once thought to be the privilege of the wealthy, the use of collaboration combines the elements of mediation with the participation of a collaborative attorney. Although it is a newer process than mediation, it is slowly gaining traction in the legal community for resolving family law disputes. Similar to mediation, the authors' proposal to expand its use to be made available to lower income litigants can be accomplished. It is already occurring in Baltimore City and it can be expanded to other jurisdictions.<sup>8</sup> Also similar to mediation, even if the parties do not settle, the parties are exposed to a different method when resolving their disputes.

The bulldog attorney, who is relentless regardless of the costs and adverse effect on the family, should be a relic of the past. In its place, I believe the

---

student's work, (3) directs and assists the student to the extent necessary, in the supervising attorney's professional judgment, to ensure that the student's participation is effective on behalf of the client the student represents, and (4) accompanies the student when the student appears in court or before an administrative agency."

<sup>7</sup> Maryland Rules of Professional Conduct, Rule 19-306.1(b) provides, "An attorney in the full-time practice of law should aspire to render at least 50 hours per year of pro bono publico legal service, and an attorney in part-time practice should aspire to render at least a pro rata number of hours."

<sup>8</sup> Approximately four years ago with a grant from the Maryland Judiciary, Administrative Office of the Courts, and Department of Family Administration, the Collaborative Project of Maryland ("CPM") was created. The intent of the CPM was to introduce the use of collaboration to a lower income litigant. A pilot project was initiated in the Circuit Court for Baltimore City during the summer of 2015. Now in its second year, litigants are referred to the collaborative process and the case is stayed pursuant to the law to permit the parties to participate in the process. If the parties are unable to settle, then the case is scheduled for hearing. Since its inception in the Circuit Court for Baltimore City, approximately 19 cases have consented to participate in the CPM Project. The outcome of each case has varied from a full settlement to the parties failing to participate and the case was referred back to court.

new lawyer should be willing to counsel the client and work with other professionals for sustaining long-term changes to the dynamics of the family law litigant. The authors were right on target when identifying the need for the lawyer to expand his or her role as counselor as well as how he or she can heal their clients. The authors have found that this objective takes shape when lawyers work with clients, “often in partnership with other professionals, to frame goals and make dispute resolution choices to maximize the emotional, psychological, and relational well-being of the individuals and communities involved.” Because this skill is especially relevant for younger attorneys and law students who may be the architects of this new model, I agree with the authors’ recommendation that these essential, new lawyering skills should begin in law school.

Courts already utilize the work of non-legal professionals. Not only does the new model continue to utilize this practice but expands its use by beginning to incorporate these individuals sooner in the process and suggest removing the services from the courtroom. Although I am not prepared at this time to excuse these services from judicial oversight, I believe the feature of providing parties early intervention services can be incorporated into existing structures.<sup>9</sup>

When focusing their attention on the courts, the authors challenge judges to not just adjudicate cases but serve as a proactive manager of family law related problems, otherwise known as therapeutic jurisprudence. The result may be judges seeing parties frequently, for more issues, and for longer periods of time; in essence, having the parties return to court for review hearings. I believe these objectives can be accomplished with revisions. One, the case flow assessments for family law cases should be terminated.<sup>10</sup> Two, it would be ideal to have more judges who have family law experience, but, regardless, judges should be provided timely and consistent training of the features of the new model to include on-line and interactive processes. Three, judges should be granted more discretion to work with both legal and non-legal professionals and to be able to delegate some of their judicial authority.

There are hurdles to the successful implementation of the new model. I see both public financing and willingness of the parties to participate as two hurdles to overcome. First, a family with fewer resources and afflicted with additional needs is unlikely to be able to afford services that may be necessary to assist the family. Although state funded insurance may be able to absorb some of the costs, it is unclear how additional services will be paid for. As to the additional services, if the court seeks to absorb these costs for the neediest, it will require additional funding or a redirecting of funds. Second, how does

---

<sup>9</sup> Currently there are a number of community mediation centers throughout the State of Maryland. I propose that these centers be expanded to include some of the features of the new model for early intervention outside of the courtroom and in the parties’ own neighborhood.

<sup>10</sup> According to Case Flow Assessment by the Maryland Judiciary, 98% of cases need to be completed within 365 days (excluding limited divorce).



the court handle a case when the parents are unwilling, or unable, to participate? This is an issue that stymies even the best intentions of any court.

Nevertheless, *Divorced from Reality: Rethinking Family Dispute Resolution*, by Jane C. Murphy and Jana B. Singer, gives judicial reformers a template when serving the family before the court. Although I believe the court has made tremendous strides for responding to the needs of families, there is room for improvement. The authors suggest that improvement takes the form of a process that works with families on a number of issues, that there are resources for intervention earlier in the process and in far more areas of litigants' lives, and that the court stays involved for longer period of times. I see this total transformation of the judicial process for family law cases as aspirational and encompassing a number of changes. However, in the interim, I believe by separating such broad goals into manageable pieces—some of which can be incorporated into existing services and others can be developed in the future—will ensure a successful new model as envisioned by the authors.